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SUPREME COURT, U. S.

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NO. 648 ~~MISC.~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

MARVIN CLEWIS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

Petition For Writ of Certiorari To The Court of Criminal Appeals of Texas

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the State of Texas, Respondent, in opposition to Petitioner's Application for Writ of Certiorari and states:

OPINION BELOW

The Court of Criminal Appeals of Texas, the highest Court having jurisdiction in criminal cases in this State, affirmed the conviction of Petitioner, Marvin Clewis, in Cause No. 37,483, on the 4th day of October, 1965, and this Opinion appears in the Record at Pages 441-445. That Court delivered another Opinion on "Appellant's Motion For Rehearing," which was delivered on November 10, 1965 (R. 461-462). This Opinion was amended by the Court on January 5, 1966 (R. 472-474).

The reason that these Opinions have been withheld from publication is due to the fact that the mandate of the Court of Criminal Appeals will not issue on any criminal case which is on writ of certiorari to the Supreme Court of the United States.

Petitioner was convicted for murder with malice and the punishment assessed was twenty-five (25) years confinement in the State penitentiary (R. 24-25).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3), and Rule 19(1), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

WAS THERE A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES UNDER THE FACTS BELOW IN THE ADMISSION INTO EVIDENCE OF THE WRITTEN CONFESSION OF PETITIONER?

II.

IS THE RULE ANNOUNCED IN *MALLORY V. UNITED STATES,* 354 U.S. 449, INTERPRETING RULE 5a OF THE FEDERAL RULES OF CRIMINAL PROCEDURE APPLICABLE TO THE STATES?

III.

WAS THERE A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH,

SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE TRIAL COURT IN DENYING PETITIONER THE RIGHT TO SEE AND INSPECT THE FIRST TWO CONFESSIONS OF PETITIONER WHICH WERE NOT OFFERED IN EVIDENCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appropriate constitutional and statutory provisions are cited in Petitioner's Brief.

STATEMENT OF THE CASE

On May 11, 1964, Petitioner's trial for the murder of Dorothy Mae Clewis was begun in the District Court of Midland County, Texas. The indictment under which Petitioner was tried alleged that he "did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewis by choking her with a belt and in some way or manner, and by some means, instrument and weapon, to the Grand Jurors unknown." (R. 1). On May 17, 1964, a verdict of guilty was returned by the jury and punishment was assessed at confinement in the State penitentiary for a term of twenty-five (25) years (R. 23). Judgment was entered on the jury's verdict (R. 24), and Marvin Clewis was thereafter sentenced in accordance therewith (R. 37).

The State's evidence shows that on Thursday, July 5, 1962, two Latin American boys found the remains of what they believed to be a human body in a shallow grave Northwest of the City of Midland, Texas (R. 40-41). This discovery was reported to the Sheriff's office, and the Sheriff's deputies went to the scene and

dug from the ground the remains of a human skeleton (R. 41). Deputy Sheriff Guy Fletcher stated that the skeleton had something across the legs that looked like a black brassiere, and a belt around the neck (R. 42). Deputy Sheriff Fletcher testified that a police officer by the name of Morales from the City Police Department assisted in the investigation (R. 43). The remains were picked up by the Ellis Funeral Home and delivered to Dr. Madsen (R. 45-46, 241). Dorothy Mae Clewis was reported missing by her daughter but was never reported missing by Marvin Clewis, Petitioner (R. 47, 248, 311).

Deputy Sheriff E. H. Kirksey's testimony substantially agreed with Deputy Sheriff Fletcher's testimony. He testified that the belt was around the skeleton's neck and the brassiere was around the legs between the knees and the hips of the skeleton (R. 49). Deputy Sheriff Kirksey took the skull that was found and carried it to Dr. Radford in Waco, Texas (R. 50). Dr. Hughston made a mold of the teeth in the skull (R. 51).

On cross-examination, Deputy Sheriff Kirksey testified that he talked to Marvin Clewis on Saturday night in the Sheriff's office (R. 55), at about 11:30 p.m. He had received a call from his office saying that Marvin Clewis was there in the office and to come down and talk to him (R. 56). He questioned Petitioner for about an hour and a half but did not put him in jail (R. 57). Petitioner was released and told to go home and to come back at 8:00 o'clock the next morning (R. 57).

Dr. D. H. Radford, a dentist from Waco, Texas, testified and identified State's Exhibit No. 9, (the mold of the teeth) (R. 60, 62, 242). He testified that in his

opinion it was a mold of the teeth of Mrs. Dorothy Mae Charles (R. 62), and that he had seen her three times in connection with some work he had done on her teeth (R. 63). The doctor testified that the reason he was so certain that it was a mold of Mrs. Dorothy Mae Charles' teeth was because the work he had done on her teeth was a very unusual case. With minute detail he went on to explain why this was such an unusual case (R. 66). The doctor identified State's Exhibit No. 10 as being a picture of Dorothy Mae Charles (R. 62) (one and the same as Dorothy Mae Clewis) (R. 69).

Mrs. James F. Burford identified State's Exhibit No. 10 (photograph of Dorothy Mae Clewis). Mrs. Burford testified that Dorothy Mae Clewis was an employee of hers who did general housekeeping for her and the last time that she saw her alive was on January 19, 1962 (R. 69). Dorothy Mae Clewis was to return for work on the following Monday, January 22, 1962, but did not report for work thereafter (R. 69).

Mrs. Shirley Jean Judi testified that her mother's husband was Marvin Clewis and identified him in the courtroom (R. 72). She testified that her mother and Petitioner lived in Apartment 7. Mrs. Judi and her husband lived in Apartment 9 in the same apartment housing area. She testified that around January of 1962, on a Saturday night, her mother and Petitioner had gone to a dance, and when her mother came home, she had a knot over her eye, was crying, and had one shoe on and one shoe in her hand (R. 74). Her mother told her that Petitioner had hit her (R. 74). Her mother raised her dress up on the side and told her that Petitioner had whipped her that night with a rubber hose and her leg was real blue and red. When Petitioner

was asked why he had hit her, he stated that she was his wife and he would hit her anytime he wanted. One night Mrs. Judi heard some tussling in the backyard and found Petitioner with his hand around her mother's neck. (R. 74). She testified that Petitioner had threatened her mother on other occasions (R. 75-76). Some time later, Mrs. Judi had occasion to be riding with Petitioner in his panel truck (R. 77). They were riding down a gravel road and made a sudden stop causing a pair of black shoes with three buttons on it to slide out from under the seat of the truck. She testified that her mother was wearing those same black shoes with the three buttons on them the last time that she had seen her alive (R. 78).

Mrs. Judi identified the black brassiere (offered as State's Exhibit No. 2), as being the one her mother wore the Saturday night that she had visited her at her home (R. 79). She identified State's Exhibit No. 3 as the belt that was used by her mother when whipping the children (R. 79, 85). Mrs. Judi, again on cross-examination, testified that Petitioner had threatened to kill her mother (R. 86).

THE FOLLOWING EVIDENCE WAS ADDUCED AT THE HEARING ON DEFENDANT'S MOTION TO EXCLUDE AND SUPPRESS THE CONFESSION.

Deputy Gene Howell of Midland County testified that on July 17, 1962, he took Petitioner's voluntary statement (R. 92, 229). He warned the Petitioner that he did not have to make any statement at all, and any statement that he would make could be used in evidence against him on his trial for the offense concerning which the statement was made (R. 93, 230). He tes-

tified that the statement had been freely and voluntarily made without any undue persuasion or any promises of reward or force (R. 93, 230). Deputy Howell talked to Petitioner for the first time on Tuesday, July 17, and that was the first time that he had talked to him about anything in connection with the case (R. 94). On Redirect Examination, Deputy Howell testified that he did not know of his own personal knowledge whether or not Petitioner had been abused. He stated that he himself did not abuse him in any way and advised the Petitioner that he (Howell) was not going to do anything to him one way or the other no matter what he did (R. 97). He told Petitioner that regardless of anything that he might say or might do or might not say or might not do, that he had nothing to fear, that no harm would come to him in any way, and that he would not be abused or even talked to any longer, if he desired not to be (R. 97, 235). There were no Texas Rangers, City police officers or polygraph operators present (R. 235). Prior to giving that statement, Petitioner was asked the possibility of giving another polygraph test, to which he readily agreed (R. 98). Before taking Petitioner's statement, the Petitioner mentioned that he would like to talk to someone. The Deputy Sheriff asked him who he would like to talk to, and Petitioner said, "Well, he didn't know for sure." The Deputy Sheriff asked him if he would like to talk to a lawyer, and Petitioner replied, "I would like to talk to my boss man." (R. 98). The Deputy Sheriff then attempted to place a call to his boss in Odessa (R. 98, 235).

> "A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.

"Q. All right, what happened?

"A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time." (R. 235)

Petitioner had some coffee that morning in the Sheriff's office (R. 236).

MARVIN CLEWIS, THE PETITIONER, TESTIFIED IN SUPPORT OF HIS MOTION TO EXCLUDE AND SUPPRESS THE CONFESSION.

Petitioner testified that his name was Marvin Clewis, that he was thirty-seven (37) years of age, and that he was in Borger, Texas, when he first heard that a body had been found Northwest of Midland. On the 4th day of July, he received a phone call from Elizabeth Johnson, and Saturday night left for Midland, Texas (R. 100). That Saturday evening before he left he received a telephone call from his sister, Annie May Owens, advising him that the Sheriff wanted to talk to him about Dorothy in Midland, Texas. (R. 101, 264). When he got to Midland, Texas, he went directly to the courthouse to see the Sheriff (R. 101). He arrived at the Sheriff's office around 11:30 or 12:00 o'clock at night. Deputy Sheriff Kirksey was called in and came down to question him. He was not placed in jail that night, but was told to go home and be back there at 8:00 o'clock or 9:00 o'clock Sunday morning (R. 266). On Sunday morning, at around 6:30, Sergeant Morales of the Police Department came by where Petitioner

was staying and asked Petitioner to go with him to the police staion (R. 103-104, 267). Officer Morales talked to Petitioner at least an hour and a half or two hours. Then another officer talked to Petitioner for about an hour (R. 105). He was then carried to a cell and locked up. After about an hour of being in the cell, the officers then got him again (R. 105), this time questioning him for about two and a half hours (R. 106). He testified that he was taken back and forth to his cell and was questioned throughout the day (R. 106). He stated that he was not offered anything at lunch or anything to eat during that day. He also testified that he did not ask for anything to eat (R. 106). He testified that he was questioned until after midnight and maybe around 2:00 o'clock in the morning (R. 107).

Petitioner testified that Monday morning Sergeant Morales came to get Petitioner at approximately 7:30 or 8:00 o'clock. Morales then questioned him for about fifteen or twenty minutes and then took Petitioner to the spot where the body had been found (R. 109). He was then taken to the Public Safety Building in Midland, Texas (R. 110), where he remained the rest of the day. Late in the evening, he drank some milk (R. 111), after having signed a statement. He did not have anything to eat at noon. After a two or three hour interval, Petitioner was given two polygraph tests (R. 111). Petitioner testified that while he was out there he was threatened by Ranger Wood, Sergeant Morales, and the fellow who was giving the polygraph test (R. 112). However, he testified that Ranger Wood did not hit him at that time (R. 112), but that Sergeant Morales slapped him up beside the head (R. 114). Later he was taken to the courthouse (R. 116). In the basement of the courthouse, Petitioner was taken before a

justice of the peace, but stated he did not remember whether his rights to waive an examining trial were explained (R. 116, 384). He was asked if he wanted a bond set (R. 116, 289).

After he left the courthouse, he was taken to the City Jail (R. 117). That Monday night he made a telephone call to Elizabeth Johnson, but he could not reach her (R. 117). After a couple of hours he was taken out of his cell and was questioned for about an hour and forty-five minutes by several officers who took turns in questioning him (R. 119). After midnight, he was then led back to his cell. He testified that he was not abused or threatened in any way by the officers that night (R. 119).

Petitioner stated that early Tuesday morning Sergeant Morales came and got him out of his cell and took him back to the office and questioned him (R. 120). On Tuesday morning, he received something to eat (R. 120, 295). He testified that he was questioned throughout the day on Tuesday and Tuesday night (R. 120). Petitioner stated that he was not questioned on Wednesday at all (R. 120-121). On Thursday morning Sergeant Morales came up to his cell and took him in Ranger Wood's car to Borger. He was not handcuffed in the automobile (R. 121). In Borger they were looking for his truck. Petitioner took them to where he worked to show them the truck (R. 122). He testified that he did not give them consent or permission to go into or search the truck (R. 122). Petitioner testified that one of the police officers at Borger bought him some milk at noon (R. 122, 300). From Borger they drove to the Public Safety Building in Midland, Texas. While at the Public Safety Building, Petitioner says

he was given a polygraph test. He testified that he had not signed any consent or agreement to take that particular test. He testified that he had given consent on Sunday (R. 123).

Petitioner testified that no one abused him during the time he stayed in the County Jail (R. 127).

On cross-examination, Petitioner testified that the Saturday night that he returned to Midland he went to the Sheriff's office and that nobody threatened or abused him in the Sheriff's office that night (R. 128). He further testified that he was not afraid at the Sheriff's office that night and was not scared. He was not asked to give a confession that night and no one tried to get him to confess (R. 128). He testified that he slept on Saturday night until around 6:30 in the morning when Officer Morales came by his house and introduced himself as an officer. While Petitioner testified that he did not know whether he was a police officer or a deputy sheriff, he did testify that he knew that he (Sergeant Morales) was a peace officer (R. 129). He testified that he was not threatened by Sergeant Morales when he arrived at the police station (R. 129), and he was not abused by anyone (R. 129). After having been questioned for about an hour or two by Sergeant Morales and another officer, Petitioner was taken to his cell where he remained for an hour without being molested. He admits that there was water in his cell and restroom facilities (R. 131). Officer Morales and another officer then got Petitioner out of his cell and took him downstairs to an office where he was questioned for an hour or two (R. 131). Petitioner testified that he was not threatened or abused in any way in that time (R. 131).

Petitioner's mother-in-law and sister visited Petitioner on Sunday. Elizabeth Johnson also visited with him (R. 132, 271, 312, 368). On Sunday night, Petitioner was questioned by Sergeant Morales and the fellow "who smokes a pipe." (R. 132). He was questioned anywhere from an hour to an hour and a half or two by each one of them on Sunday night. He stated it was past midnight when he was carried back to his cell. Petitioner testified that he was not threatened in any way during this period of time (R. 133). Petitioner stated he was allowed to rest and was left alone in his cell from approximately 2:00 o'clock a.m. on Monday until 7:30 or 8:30 that morning (R. 133). He was not abused by anyone when he was driven to the grave on Monday morning by Sergeant Morales and two other officers (R. 133-134). He was not threatened or anything of that nature by any of the officers (R. 134). He was out there at the grave anywhere from twenty to thirty minutes and there were no threats out there or abuses of any kind. On Sunday, Petitioner signed permission to take the polygraph test (R. 134). He testified that he was not threatened in any way to sign the waiver to take the polygraph examination (R. 135). He admitted that he was not scared about signing the permission to take the exam (R. 135). On Monday morning, he was questioned at the Public Safety Building by Sergeant Morales, Ranger Wood and Reed (R. 135).

Petitioner testified that he was not abused in any way when he was taken to the justice of the peace office in the courthouse (R. 139). Petitioner testified that he called Elizabeth Johnson on Monday night but could not reach her because she was not at home (R. 140, 312). Petitioner testified that he was not abused by

Morales or the "big man with the pipe" or the "dark-headed man" on Monday night. He was not threatened, abused and no one struck him with anything that night (R. 141). Nobody bothered him on Monday night after he was placed in his cell (R. 142).

On Tuesday morning, Sergeant Morales and a uniformed police officer took him down to the office. He was not threatened or abused in any way (R. 142). That morning Sergeant Morales did not threaten, strike him or abuse him in any way (R. 143). On Tuesday Petitioner had a roll, potato and a slice of bologna in the morning (R. 143, 295). Petitioner testified there was no abuse of any kind on Tuesday (R. 144). All day Tuesday Petitioner was not threatened and was not abused in any way (R. 145). Wednesday, he said he was not questioned at all by anyone. He was left alone in his cell (R. 145). He was fed during those days (R. 146). He had a bed to sleep in and could have gotten a good night's sleep on Wednesday night, however, he testified that he did not get a good night's rest (R. 146).

Petitioner testified as follows at Page 145 of the Record:

"Q. All right, and then you were put in your cell and left alone. Is that correct?

"A. Yes sir.

"Q. Let's see if I have got this straight now. All day Tuesday you never were threatened and were never abused in any way.

"A. No, sir.

"Q. What about Wednesday?

"A. Wednesday I don't think they questioned me at all. If they did I don't remember it.

"Q. All right, no questioning on Wednesday.

"A. No, sir.

"Q. You were just left alone by yourself. Is that right?

"A. Well, yes, sir, as near as I can remember.

"Q. All right. You had food? They fed you?

"A. I guess they brought me something.

"Q. They treated you well in every way. Is that right?

"A. Yes, sir, I suppose so.

"Q. O. K. You got a good night's rest on Wednesday night.

"A. There wasn't nobody bothered me; I wouldn't say I got a good night's rest.

"Q. Your had a bed to sleep on and all that.

"A. Yes, sir.

"Q. I guess that brings us to Thursday then. What happened Thursday?

"A. Well, Sgt. Morales came up there and got me Thursday.

"Q. Excuse me, go ahead.

"A. He came up there and got me Thursday.

"Q. Is this the day you went to Borger?

"A. Yes, sir.

"Q. All right, and it was Morales and Mr. Wood. Was there anybody else with you that went to Borger?

"A. Well, it was Sgt. Woods, Mr. Morales, and some other fellow.

"Q. Did they threaten or abuse you on the way to Borger?

"A. No, sir."

In Borger, Texas, Petitioner had some milk (R. 147). After Petitioner got back to Midland on Thursday night, he was not threatened or abused in any manner and was left alone in his cell (R. 148). He was not questioned on Friday (R. 149). On Friday he was just taken over from the City Jail to the County Jail, but he was not abused, threatened or anything else (R. 149). After he was placed in the County Jail, he never saw the Texas Ranger again (R. 149), and he did not see Sergeant Morales again (R. 149). He never saw the polygraph operator after Thursday (R. 150). On Friday, while in the County Jail, no officer or any official, deputy sheriff or otherwise, questioned or talked to Petitioner that day. On Saturday no one asked Petitioner any questions or abused him or threatened him in any way (R. 150). On Monday, no one talked to Petitioner, nobody abused him or threatened him in any way. Deputy Sheriff Howell talked to Petitioner for the first time on Tuesday morning (R. 150). The only thing that happened during that period of time was that Petitioner was taken from his cell and was fingerprinted (R. 151). Petitioner testified that Mr. Howell did not abuse him in any way on Tuesday morning. He was not abused or threatened by anyone (R. 151, 306, 307). Petitioner testified that he was treated real nice in every way by Mr. Fletcher and Mr. Howell (R. 151). Mr. Mims also treated Petitioner very nice (R. 152). Petitioner testified that he was fed all right when he was in the County Jail. He got all the rest he needed.

On re-cross examination, Petitioner testified that on Tuesday morning when he was questioned by Mr.

Fletcher and Mr. Howell, he was not hungry (R. 153). On Pages 154 and 155 of the Record, Petitioner testified that he did talk to a lawyer, H. S. Harris, but that he did not remember the date or whether or not it was made before the second confession was given. Petitioner testified that he talked alone with the lawyer (R. 155, 314):

> "Q. . . . Did you talk alone with the lawyer, just you and him alone?
>
> "A. Yes, sir." (R. 155).

Officer Jesus Morales testified that on Sunday morning, July 8, 1962, he went to Petitioner's house, identified himself as a peace officer and advised him that he wanted to talk to him and that he wanted to talk to him at the police station, and asked him if he would come along with him (R. 158). Officer Morales testified that on Sunday morning Petitioner had some coffee and a roll (R. 368, 377). He talked to him about an hour and a half and then placed him in jail (R. 158, 367). Morales testified that he was not sure, but that he thought he had brought him some cigars that morning around 11:00 o'clock and might have talked to him 15 or 20 minutes (R. 158, 377). He did not threaten or abuse or strike Petitioner on Sunday, and he never drew back as if he were going to hit him (R. 159, 368). On Sunday, Petitioner had three visitors: his sister, Annie May Owens; Elizabeth Johnson, and Rachel Garnett (R. 159, 312). They had an opportunity to talk to Petitioner alone on Sunday afternoon (R. 159, 368). Petitioner did not eat on Sunday evening because he stated that he was not hungry (R. 160). Elizabeth Johnson brought Petitioner some soup that evening as Petitioner would not eat, either because he was not

hungry or he did not want the food (R. 160). Late on Sunday afternoon, a plate of food was brought to Petitioner but he did not eat it (R. 160, 379). Officer Morales testified that he left Sunday afternoon around 5:30 and did not talk to him any more on that day (R. 160). Officer Morales did not talk to Petitioner at any time on Sunday night or after midnight (R. 368). On Monday morning Officer Morales, at around 7:00 o'clock in the morning, went to see Petitioner. Petitioner was in his cell, and there were some rolls of bread in his cellblock laying between the bars of his cell (R. 161). Officer Morales denied having threatened, abused or coerced Petitioner in any way on the way up to where the body was found or while at the grave (R. 162). From there they went back to the police station where Petitioner changed his clothes (R. 163). They were at the police station about thirty minutes while Petitioner changed his clothes and then departed for the Department of Public Safety (R. 163). Officer Morales testified that he did not see anybody abuse Petitioner in any way while he was at the Department of Public Safety (R. 164). Morales denied having interrogated him for any long period of time. He admits having questioned him for brief periods of time. On Monday, at the Department of Public Safety, Officer Morales asked Petitioner if he wanted some food, and he said no, and then Officer Morales asked him if he wanted some soup, and Petitioner replied no. Again Morales asked him if he wanted some milk, and Petitioner said no, and finally the Officer asked him if he wanted a Coke, to which Petitioner replied, "Yeah, I'll take a Coke." Officer Morales then got a Coca-Cola for Petitioner (R. 165, 369). Petitioner did not request to see a lawyer (R. 370). After that there

were short periods of interrogation, anywhere from 15 to 20 minutes. On Monday afternoon, Sergeant Morales denied having struck the Petitioner at any time and denied having called him a "black s.o.b." Morales denied having heard anyone state that they would get Petitioner some milk if he confessed (R. 166). On the way to the police station, Morales stopped at a grocery store and bought Petitioner some soup and crackers (R. 370, 384).

Petitioner was visited by Elizabeth Johnson on Monday night around 9:00 o'clock (R. 370).

Officer Morales denied having talked to Petitioner at any time on Tuesday, July 10 (R. 371, 386). He denied having been anywhere around Petitioner on Tuesday night. Officer Morales did not go to Borger on Thursday, July 12, with the Petitioner. However, on Thursday morning before Petitioner left for Borger he talked to a lawyer. The Record states on Page 374:

"Q. All right, sir, I call your attention to Thursday morning. You know Mr. H. S. Harris?

"A. Yes, sir.

"Q. Would you tell the jury, please, whether or not this defendant had a visitor Thursday morning.

"A. He did.

"Q. Was it Mr. Harris?

"A. Well, I went upstairs at the police department and noticed Mr. Harris talking to Mr. Clewis over here in one of the cells, and I went over to where Mr. Harris was and asked him if he wanted to use one of our offices, which is also located upstairs. He said he would be glad to, so I directed him back into

the office, our detective office—we have three rooms back there—and he went into the furtherest office in there, and I asked him if he wanted any coffee and he said he did. I asked Marvin if he wanted something, so I brought two cups of coffee in there, and Mr. Clewis over here said he didn't want any coffee and I asked him if he wanted some milk and he said yes, so I went back—we had some milk for him in the ice box there in the kitchen—and I brought a cup and a quart of milk to him, and when I left Mr. Harris was talking to him.

"Q. Is Mr. Harris an attorney here in town?

"A. Yes, sir, he is.

"Q. This was Thursday morning?

"A. Yes, sir.

"Q. July 12, 1962.

"A. That is correct."

Morales was positive that Petitioner saw a lawyer on Thursday morning (R. 388). He denies having cursed or used profane language toward the Petitioner (R. 166). He denied having abused, coerced or threatened Petitioner on that Thursday in Borger, Texas (R. 167). Petitioner was offered food during the time that he was in Borger, Texas (R. 168), but instead of taking food, he drank milk (R. 168). In Borger, Petitioner's truck was searched after he had given permission to search the truck (R. 168, 371, 416). In Borger he visited with his brother-in-law who was there (R. 168). The Record reflects at Page 372:

"Q. Was he allowed to have visitors while he was up there in Borger?

"A. Yes, sir. When we were searching the panel truck, he had some—I think it was his brother-in-law, he said it was his brother-in-law—he talked to him and they brought him some water there. He sat down on the running board of the panel, or right next to the panel, which I found out later that one of them was his brother-in-law. I think his name was Owens.

"Q. He visited there with his brother-in-law.

"A. That is correct.

"Q. Brought him some water.

"A. Yes."

Officer Morales denied having heard John Wood curse or abuse the Petitioner in Borger (R. 168). On cross-examination, Officer Morales stated that he had asked Clewis if he wanted to come to the police station on Sunday morning (R. 170). When asked what would happen if he had not come, Officer Morales responded with, "He would have stayed there." (R. 170). Officer Morales did not talk with Petitioner on Sunday night (R. 176). Mrs. Johnson brought Petitioner some soup on Sunday about 5:30 p.m. (R. 176). He was offered food on Sunday, but was not hungry and did not eat (R. 177). Petitioner had some rolls and coffee on Sunday morning (R. 177). He saw Petitioner drink some coffee and eat the rolls (R. 177). On Monday morning he was given some rolls, but he did not want them (R. 178). Petitioner did not want any lunch on Monday noon (R. 178). He did have a Coke, and later on in the evening he had some milk. A quart of milk was purchased for him (R. 178, 210). Sergeant Kuykendall went after the quart of milk, and the milk was given

to Petitioner before he gave the statement (R. 178, 399). Petitioner gave his statement on Monday afternoon in the District Attorney's office. Later on that night, he was taken before a magistrate (R. 180). The Sergeant testified that he never touched the Petitioner, never slapped him or anything (R. 182). He was given an opportunity to eat but he never did want to eat anything (R. 182-183).

John Wood, the Texas Ranger, testified that he saw Petitioner Clewis for the first time on Monday, July 9, 1962. He denied having questioned Petitioner under prolonged questioning and denied having exerted any force or threats against Petitioner at any time. He particularly denied having told Petitioner that if he did not confess he "would turn his black ass wrong side out" (R. 184, 408). The Texas Ranger testified that on Monday, July 9, he talked to Petitioner for about fifteen minues (R. 184, 407). The Ranger denied having seen Petitioner on Tuesday, July 10 (R. 185, 409). On Thursday, July 12, the Texas Ranger talked to Petitioner twice. The first time for about five minutes and the second time ten or fifteen minutes (R. 185). He denied having slapped Petitioner or threatened him on that day (R. 185, 408). On July 11, Wednesday, the Ranger took the Petitioner to Borger. He denied having threatened Petitioner on the way to Borger; and denied having abused or mistreated him in Borger on Wednesday, July 11 (R. 186). He denied ever having abused him physically or orally. The Ranger testified that on Thursday, July 12, he talked to Petitioner about 3:00 p.m. He testified that he saw him earlier in the morning around 11:45 with a cigar in his hand and a container of milk (R. 189, 414). He stated that he saw Petitioner drinking milk on Mon-

day (R. 192, 414), and that Petitioner was not refused any food or rest.

Officer Jesus Morales when recalled to the stand testified that the Petitioner had a visitor on Monday night, July 9, 1962. Elizabeth Johnson paid him a visit in the City Jail (R. 193). He visited with her alone that night around 9:00 o'clock. They visited downstairs in the jail and upstairs (R. 193, 370).

Burl Reed testified that he was the polygraph examiner for the Department of Public Safety and that he saw Petitioner on Monday, July 9, 1962, but did not question him over any long period of time (R. 194). On Monday he questioned Petitioner for a short period of time involving a matter of minutes and had rest periods in between. He denied ever having told Petitioner that if he signed a confession he would get him some milk (R. 195, 337). He denied having exerted any force or threats or coercion against Petitioner and denied ever having slapped him. He denied ever having called him a "black s.o.b." (R. 338).

Reed did not see Petitioner on Tuesday (R. 337) or Wednesday (R. 195-196). On Thursday, July 12, 1962, he admits having questioned Petitioner for approximately ten minutes. He was given three tests that day and denied having used any force on Petitioner to get him to take the tests. He denied having abused him orally or physically (R. 196, 338). The longest time he admits having talked to Petitioner outside of giving the exam was approximately for thirty minutes (R. 201, 339). On Thursday afternoon, the longest period of time in which he talked to him was maybe ten or fifteen minutes (R. 202, 338).

Herman Wicker, a member of the City of Midland

Police Department, testified that he saw Petitioner on Sunday, July 8, 1962. He was the "big man with the pipe" (R. 203, 359). He worked the 3:00 p.m. to 11:00 p.m. shift (R. 358). On Monday night around 7:30 or 8:00, he saw Petitioner but denied having questioned him or having threatened or coerced him (R. 359). He denied having tried to get a confession out of Petitioner (R. 203). He saw the Petitioner take some food on Monday night in the City Jail (R. 204, 359). He specifically denied having questioned Petitioner at midnight or thereafter (R. 359). He did not see Petitioner on Tuesday, July 10, at all. The Record, at Pages 359 and 360, state:

"Q. Would I be accurate, sir, in assuming you are what is termed a big man who smoked a pipe?

"A. Yes, sir, I smoked a pipe.

"Q. Now, sir, I ask you about Monday, July 9th, and ask you, sir, if you had occasion to see the defendant.

"A. Yes, I did.

"Q. All right, sir, where was that?

"A. That same place, upstairs in the detective office.

"Q. All right, sir, about what time was this that you saw him?

"A. Between 7:30 and 8:00 o'clock.

"Q. Were you interrogating him at that time?

"A. No, sir.

"Q. Were you trying to get a confession out of him?

"A. No, sir.

"Q. Were you trying to force a confession out of him?

"A. No, sir.

"Q. Did you abuse him in any way?

"A. No, sir.

"Q. Do you recall whether or not he had any food at that time?

"A. Yes, sir, he did.

"Q. Tell the jury, please, what you recall about the food.

"A. Well, the trusty brought in some warm soup, and he had a quart of sweet milk on the desk in front of him. He was sitting in the back office in the northeast corner of the building, sitting at a desk, and he ate some soup and drank some milk.

"Q. Do you recall saying anything to him about 'Do you want a doctor?' or anything of that nature?

"A. Yes, sir, I was sitting in the front office and he was sitting in the back, and I was sitting where I could see him through the door, and I noticed he began to act like he was wanting to vomit or acted kind of like he was sick and I asked him was he all right, and he said well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said 'no.'

"Q. All right, sir. Were you with him any more on Monday besides that approximate half hour you mentioned?

"A. No, sir.

"Q. Did you interrogate him later that night?

"A. No, sir, I did not.

"Q. Did you interrogate him on past midnight?

"A. No, sir.

"Q. Did you try to force a confession out of him past midnight?

"A. No, sir.

"Q. Did you threaten or abuse this defendant in any way?

"A. No, sir."

On Thursday night between 9:30 and 10:00 o'clock, he talked to Petitioner for twenty or thirty minutes but stated that he did not try to coerce or persuade him to make a confession. He did not refuse him any food or rest during any of that period of time (R. 204). He did not question Petitioner at all on Sunday night.

Detective Wayne Gideon of the Midland Police Department, (referred to by Petitioner as a tall officer with a lump or knot on the side of his head [R. 401]), testified that he did not see Petitioner at all on Sunday, July 8, 1962, and did not force Petitioner to sign a waiver to take a polygraph test on that Sunday, July 8 (R. 207). He denied having gone out to the grave in the automobile with Petitioner on Monday morning, but testified that he saw Petitioner around 8:30 in the morning of the 9th of July when Sergeant Morales

brought him into his office. He denied having questioned Petitioner for prolonged periods of time and denied having threatened, coerced or abused Petitioner at any time (R. 402). He denied having questioned him in Midland. He admitted having questioned Petitioner about two or three minutes on Monday, but did not threaten or abuse him during those three minutes. He denied having tried to force a confession out of Petitioner and did not see Petitioner at all on Tuesday, July 10.

Gideon testified that he had seen Petitioner shortly before noon on the morning of Monday, July 9, when Petitioner was in the polygraph room where he was drinking a Coke or soft drink and smoking a cigar. He then asked Petitioner how he was doing, and Petitioner replied, "I'm doing fine." (R. 210, 402). On Monday, on the way to the station from the polygraph examination, Petitioner remarked to Gideon that he would like to have some soup, that he had an ulcerated stomach. They stopped at a little grocery store on North Big Spring Street and Sergeant Morales went inside the store and bought him some soup and crackers, and then returned to the police station and made arrangements with the lieutenant in charge of that particular shift to feed Petitioner the soup (R. 212). Gideon testified that that morning Petitioner had breakfast rolls and coffee and, although he admits not having been there, he testified that Petitioner had told him. (R. 213). In the early part of the afternoon, Petitioner asked one of the officers if he could have some milk and Sergeant Victor Kuykendall left and got him some milk (R. 213).

Ray Robbins, a member of the Midland Police Department, testified that for about an hour he questioned

Petitioner on Monday night between 10:00 and 11:00 o'clock. He denied having questioned him past midnight (R. 214, 349). He admits seeing Petitioner on Sunday, July 8, but denied having interrogated him at all on that day (R. 215, 348). He denied having seen Petitioner any time on Tuesday (R. 215). He testified that the only time he talked to Petitioner was on Monday night for about an hour and did not question him at any other time. To his knowledge, no one questioned Petitioner on Sunday night (R. 216). He further testified that he was off on Tuesday and Wednesday as these were his regular days off (R. 217). He admitted having been at the Department of Public Safety for about fifteen or twenty minutes on Thursday when Petitioner was being brought back to the police station (R. 217).

Lewis B. Salinas, a member of the Midland Police Department, testified that he was the desk sergeant at the police station (R. 219). His duties as such were to have custody of the keys to the jail. He testified that Petitioner was not taken out of his cell or put into his cell anytime after midnight on Sunday, July 8, 1962. Petitioner was neither taken out of his cell or taken to his cell after midnight on Monday, July 9, 1962 (R. 357).

L. O. Wright testified that he was sergeant of the Midland Police Department and was on duty as desk sergeant on Tuesday, July 10, 1962, from 11:00 p.m. to 7:00 a.m. the next morning (R. 220). He had the keys to the jail (R. 353). He testified that Petitioner was not taken out of his cell after midnight Tuesday night (R. 220), or early morning hours of Wednesday (R. 353).

Garland Black, an employee of the Midland Police Department, testified that he worked from 7:00 o'clock in the morning until 3:00 o'clock in the afternoon and that he was on duty Monday, July 9, and Tuesday, July 10, and that on Tuesday, July 10, he fed Petitioner in his cell (R. 221).

Lonnie R. Richardson testified that he was a member of the Midland Police Department in July, 1962, and that he had the 3:00 p.m. to 11:00 p.m. shift as desk sergeant (R. 354). He stated that on Thursday, July 12, 1962, he fed Petitioner at approximately 7:00 o'clock in the afternoon in his cell (R. 222). At that time he fed Petitioner some tomato soup (R. 355). On Wednesday, July 11, 1962, he fed Petitioner milk and crackers (R. 223, 355).

Cope Routh, a reporter for the Midland Reporter-Telegram, testified that he saw Petitioner on July 10, 1962, in the Detective's office. He saw Petitioner around 7:00 o'clock in the morning and testified that Petitioner was a very unhappy appearing individual. He did not recall, however, whether Petitioner had bloodshot eyes as had been reported in the newspaper. He denied that Petitioner had told him that he had been kept up all night one night by the police (R. 225). He testified that he felt certain one of the police officers had told him that Petitioner had stated, "Just bring me some milk and I will give you a statement and sign it." But, he did not remember which officer it was (R. 225).

Victor Kuykendall testified that he was a detective from the Midland Police Department; that he did not see Petitioner on Sunday, July 8, 1962; that on July 9, 1962, Monday, he did see Petitioner but did not in-

terrogate him at any time during that day. He did not see anyone curse, threaten, strike or abuse Petitioner (R. 398). On Tuesday, July 10, 1962, he did talk to Petitioner for a period between fifteen and twenty minutes but testified that he did not abuse or threaten him in any way or coerce him or mistreat him in any manner (R. 226, 397). He did not see him on Wednesday. On Thursday, he saw Petitioner for a few minutes driving to the Department of Public Safety, but did not interrogate him any on that day (R. 227). He did not interrogate him or try to get a confession from Petitioner and did not threaten him or abuse him in any way. (R. 227).

Rachel Garnett, the mother of the deceased, Dorothy Mae Clewis, testified that one Sunday afternoon about 1:00 o'clock, she received a telephone call from her granddaughter asking her to come at once to her daughter's house. When she arrived at the house she heard Marvin Clewis, Petitioner, state, "Dorothy, I am going to kill you." (R. 328). When Mrs. Garnett opened the door to the apartment, the deceased stated, "Mama, Marvin says he is going to kill me." At that time Petitioner was holding a gun and aiming it at deceased's face (R. 329).

Garland Black testified that on one day he served Petitioner milk at least three times (R. 346). He testified that he witnessed Petitioner sign a consent for the officers to search the panel truck in Borger, Texas. (R. 346). The consent was signed on the morning of July 11.

The consent, dated July 11, 1962, signed by Petitioner, bearing signatures of two witnesses and giving officers permission to search his panel truck in

Borger, Texas, was offered as State's Exhibit No. 14 without any objection from the Petitioner (R. 347).

Ray Robbins, Detective of the Midland Police Department, testified that he observed Petitioner making a telephone call from the police station on Thursday, July 12, 1962. The call was made in late afternoon or early evening between 6:00 and 7:00 or 7:30. Mr. Robbins testified that he overheard Petitioner state that he was being treated all right and that he was being supplied with food that he wanted, cigars, etc. (R. 350). Detective Robbins testified that Petitioner addressed the person on the telephone as "Mama Teen," and they knew her to be Elizabeth Johnson (R. 351). The only time that he talked to Petitioner was on Monday night (R. 352).

Wayne Merritt testified that on Wednesday, July 11, 1962, he accompanied John Wood and Jesus Morales and the Petitioner to Borger. They had gone to Borger to look at a panel truck. While the officers inspected the truck, friends of Petitioner's visited with him (R. 363).

Officer Morales testified that while in Borger when they were searching the panel truck, Petitioner's brother-in-law, a fellow by the name of Owens, talked to Petitioner and brought him some water (R. 372).

Wayne Taylor, Assistant Chief of the Midland Police Department, testified that on Thursday, July 12, 1962, he had occasion to bring Petitioner from the Department of Public Safety back to the City Police Station. At that time Taylor asked him if he had been mistreated in any way and Petitioner said that he had not but had been treated real well ever since he had been handled by the officers (R. 396).

ARGUMENT AND AUTHORITIES

I.

A written statement made by Petitioner to Deputy Sheriff Gene Howell, of Midland County, on July 17, 1962, after being duly warned, was introduced in evidence as State's Exhibit No. 15. In the statement, Petitioner admitted that he choked his wife to death with a belt during the latter part of January, 1962, while the two were tussling and fighting in Petitioner's truck parked on a dirt road just outside Midland, Texas. He admitted having placed her body in a hole which he dug with a shovel and covering it with sand. Petitioner related that when he buried his wife, the belt which he choked her to death with was still around her neck.

Testimony was offered that on a Saturday night in January, 1962, Petitioner had threatened to kill the deceased and had choked her.

During the trial, Petitioner denied having killed his wife and repudiated the written statement that was introduced by the State.

Petitioner's "Motion To Exclude and Suppress State's Confession," was heard by the trial court in the absence of a jury. After the Motion had been by the Court overruled, evidence was presented before the jury on the question of the voluntary nature of the confession and such issue was submitted to the jury in the court's charge, under appropriate instructions.

Briefly, the evidence presented on the question of the admissibility of the confession shows that, after receiving word that his wife's body had been found and that the sheriff wanted to talk to him, Petitioner

came from Borger to Midland, on Saturday night, July 7, 1962. He arrived at the Sheriff's office around 11:30 p.m. After talking to Deputy Sheriff Kirksey for about an hour and a half, Petitioner was permitted to go, with instructions to return the next morning at 8:00 a.m. He then left the Sheriff's office and went to the home of Elizabeth Johnson.

At 6:00 a.m. on Sunday, July 8, 1962, Sergeant Jesus Morales of the City of Midland Police Department, went to the Johnson home and took Petitioner to the police station for questioning about his wife's disappearance. Petitioner was questioned at intervals during the day and also on that day was visited by his sister, Annie May Owen, his mother-in-law, Rachel Garnett, and Elizabeth Johnson. Officer Jesus Morales testified that Petitioner had some coffee and rolls that morning and was offered food throughout the day, but Petitioner denied it. There was a dispute in the testimony as to whether Petitioner was questioned after midnight, Petitioner swearing that he was and the officer stating that he was not.

On Monday, July 9, Petitioner was taken from the City Jail around 7:30 a.m. by Sergeant Morales and Sergeant Kuykendall. The three proceeded to the place where his wife's body had been found. When Petitioner led the officers to the hole in the ground, he stated, "I guess that is where she was buried."

From the scene, Petitioner was then taken to the Department of Public Safety, where he was given a polygraph examination by Officer Burl Reed. During the afternoon, Petitioner was questioned and late that evening he made and signed a written statement to Sergeant Morales in which he admitted killing his wife by

shooting her with a gun. After signing the statement, Petitioner was taken before a magistrate, where bond was set, and Petitioner was then returned to the City Jail. Again, there was a dispute in the testimony as to whether or not Petitioner ate and drank a Coke at the Department of Public Safety, and back at the City Jail. Testimony was offered that Petitioner was offered food and soup and finally settled for a Coke at the Department of Public Safety, and a quart of milk at the City Jail. Several officers testified having seen Petitioner drinking the Coke and smoking a cigar around noon at the Department of Public Safety. Petitioner denied most, if not all, of this testimony. There was also a dispute in the testimony as to whether Elizabeth Johnson had visited Petitioner on Monday night at the City Jail in private (R. 193); Petitioner swearing that he was not visited that night and the officer stating that he was (R. 370).

There was a dispute in the testimony as to whether Petitioner was questioned on Tuesday; Petitioner stating that he was (R. 294), and Sergeant Morales testifying that he was not (R. 392, 371). Petitioner stated that he had a roll and potato and a slice of bologna on that day (R. 143, 295). On Tuesday, his ex-wife visited Petitioner (R. 297), and was also visited by Mabel Webster (R. 297).

The jailer denied that Petitioner was taken out of his cell after midnight (R. 220). On Tuesday morning, Petitioner talked to a reporter (R. 399).

Wednesday, July 11, no claim was made by Petitioner that he was questioned during that day. There is a conflict in the testimony as to whether he was carried that day or the following day to Borger, where

his truck was searched by the officers. Suffice it to say, he was carried on one of the two days to Borger, where the officers, with his consent (R. 410), did search his truck. Again there was a dispute in the testimony as to whether Petitioner was visited by his brother-in-law while at Borger; Petitioner swearing that he was not and the officers stating that he was (R. 410). Petitioner testified that he was not questioned on this day (R. 120, 145, 297), and was fed during these days (R. 146). On Thursday, July 12, 1962, Petitioner talked to a lawyer in private (R. 374, 388). There is a dispute in the testimony as to whether Petitioner was taken to Borger by Sergeant Wood and Sergeant Morales. Morales denied having taken Petitioner to Borger on Thursday (R. 166, 297, 298). Petitioner stated that Sergeant Wood and Sergeant Morales took him to Borger that morning (R. 189, 297). Suffice it to say that he was carried to the Department of Public Safety at Midland where another polygraph examination was given him. Following this examination Petitioner gave a second written statement to Sergeant Morales in which he admitted killing his wife by strangling her with a belt. Petitioner testified that he was not abused on the way to Borger (R. 146). There was evidence that Petitioner was offered food when he was in Borger (R. 168). At Borger, Ranger Wood saw Petitioner around 11:45 with a cigar and a container of milk (R. 190, 300, 410, 414). Sergeant Morales did not question Petitioner in the morning and only after 3:00 p.m. on Thursday afternoon. The statement was given at 5:00 p.m. (R. 389, 390). Petitioner was driven back to the police station on that day by the Assistant Chief of Police Wayne Taylor. He told Taylor that he had not been mistreated by the officers (R. 396).

On Friday, July 13, Petitioner was delivered by the city officers to the sheriff and placed in the Midland County Jail.

The proof further showed that before Petitioner made and signed the third statement, which was the only confession introduced into evidence, he had consulted with an attorney (R. 155, 374, 388).

There is no claim that Petitioner was questioned by anyone from Friday until Tuesday, July 17, around 10:30 a.m. when he was questioned by Deputy Howell and District Attorney Joe Mims and, after being duly warned, made and signed the written confession introduced into evidence.

On Page 313 of the Record, Petitioner testified:

"Q. When you came to the county jail here in the courthouse, you came on Friday. Right?

"A. Yes, sir, I think so. I am not much sure, but I believe that's right.

"Q. And they treated you real nice.

"A. Yes, sir.

"Q. Nobody bothered you on Friday?

"A. No, sir, not as I remembers.

"Q. Saturday?

"A. No, sir.

"Q. Sunday?

"A. No, sir.

"Q. You remember those people coming up there Sunday to hold church services, don't you?

"A. Yes, sir.

"Q. Nobody mistreated you on Monday?

"A. No, sir.

"Q. And nobody mistreated you on Tuesday. That was the Tuesday while you were here at the county, I am talking about.

"A. No, sir.

"Q. All right, and you had plenty of food.

"A. Yes, sir.

"Q. While you were here at the county. Plenty of rest?

"A. Yes, sir.

"Q. None of these officers that you have been testifying about came here to the county to see you, did they, sir?

"A. They didn't come to see me."

On Page 148 of the Record we find:

"Q. No abuse, no threats, no nothing, Thursday night?

"A. Not after I got back to the city.

"Q. All right, sir, and then Friday they didn't ask you any questions down at the city.

"A. No, sir, not as I remember.

"Q. Thursday night you were left alone.

"A. Yes, sir.

"Q. At the city Thursday night.

"A. Yes, sir.

"Q. You weren't interrogated or bothered in any way Thursday night?

"A. No, sir, I don't think so.

"Q. You had a bed and toilet facilities and things of that nature, didn't you, sir?

"A. Yes, sir.

"Q. Friday. Did they question you any Friday at the city?

"A. No, sir, I don't believe they did. If they did I don't remember.

"Q. All that happened to you Friday was that they brought you over to the county jail. Is that correct, sir?

"A. Yes, sir.

"Q. No abuse, no threat, none of that sort of thing—

"A. No, sir.

"Q. —on Friday. They treated you all right on Friday.

"A. Yes, sir.

"Q. O.K. Do you know who brought you over here to the county?

"A. That Friday?

"Q. Friday, yes, sir.

"A. No, sir, I am not for sure. I know Sgt. Morales did for one and I don't know who else.

"Q. Mr. Clewis, we have been talking about Friday.

"A. Yes, sir.

"Q. And you were brought here to the county jail.

"A. Yes, sir.

"Q. Now, after you were put in the county jail, you never did see the Texas Ranger any more, did you, sir?

"A. No, sir, I don't believe I did.

"Q. And you didn't see Morales any more, did you, sir?

"A. I am not sure. Seems to me like I was down taking fingerprints or something one time and I saw Sgt. Morales. I am not sure about that.

"Q. You mean after you were over here at the county you saw Morales?

"A. Like I says, I says I'm not sure. I says I think I did, is what I says.

"Q. Did he ever ask you questions over here?

"A. No, sir.

"Q. If you saw him, he never had anything to do with you. Is that right?

"A. That's right.

"Q. But you are not sure you saw him.

"A. No, sir, I'm not sure.

"Q. All right, what about the polygraph operator. Did you use the polygraph operater after you came to the county?

"A. No, sir.

"Q. Well, did you see any of the city officers? You didn't see any of them after you came over here to the county jail, did you?

"A. No, sir, I don't think I did.

"Q. And, as a matter of fact, nobody, no officials, deputy sheriffs or anybody else, asked you any questions or talked to you on that Friday when you were brought over here, did they? They didn't ask you any questions, did they?

"A. No, sir.

"Q. Didn't threaten you in any way or anything like that.

"A. No, sir.

"Q. Didn't abuse you in any way, of course.

"A. No, sir.

"Q. And then Saturday nobody asked you any questions, did they?

"A. Well, no, sir, not as I know of.

"Q. Didn't abuse you or threaten you in any way here at the county. Nobody did that, did they?

"A. No, sir.

"Q. And then on Sunday nobody abused you or threatened you in any way, did they?

"A. No, sir.

"Q. I see. Then Monday nobody abused you or threatened you in any way.

"A. No, sir.

"Q. And nobody questioned you on Sunday nor Monday.

"A. No, sir, I believe not.

"Q. So, the first time after you came to the county, the first time that you talked to any peace officer, was when you talked to Mr. Gene Howell Tuesday morning. Is that right, sir?

"A. No, sir.

"Q. That's wrong?

"A. Well, I believe it was Mr. Fletcher. Some of them come up and got me and taken my fingerprints.

"Q. Oh, to take your fingerprints. They didn't talk to you about the case?

"A. No, sir.

"Q. They didn't abuse you in any way?

"A. No, sir.

"Q. They didn't hurt you or scare you in any way, did they?

"A. No, sir.

"Q. Just to take your fingerprints.

"A. Yes, sir.

"Q. All right, except to take your fingerprints, did anybody talk to you or question you or scare you or abuse you in any way here at the county?

"A. No, sir.

"Q. All right. And Tuesday morning, when you were talking to Mr. Howell,—you know Mr. Howell, the man who testified here today?

"A. Yes, sir.

"Q. When you were talking to Mr. Howell, he didn't abuse you in any way, did he, Mr. Clewis?

"A. No, sir, he didn't abuse me.

"Q. He didn't threaten you?

"A. No, sir.

"Q. And Mr. Fletcher didn't abuse you in any way, did he?

"A. No, sir.

"Q. He didn't threaten you in any way?

"A. No, sir.

"Q. And you certainly had no reason to be scared of Mr. Howell, did you, sir?

"A. Well, I don't know, sir.

"Q. Did he do anything to make you scared of him?

"A. No, sir, he never did nothing for me to be scared of him.

"Q. And did Mr. Fletcher do anything to make you scared of him?

"A. No, sir.

"Q. He treated you real nice in every way. Is that right—Mr. Fletcher and Mr. Howell?

"A. Yes, sir, they talked all right."

In his testimony, Petitioner stated that he was threatened and physically abused by Sergeant Morales, Ranger John Wood, and polygraph operator Reed. This was specifically denied by each of them. Petitioner also claimed that he was without food while in custody of the city police.

Testimony was presented by the State that Petitioner was offered food which, on occasions, he would refuse. On other occasions he was given milk and soup, for a stomach condition he claimed he had.

In a Supplemental Transcript, certain findings by the trial court which were reduced to writing were filed in the trial court and were forwarded to the Court of Criminal Appeals of the State of Texas. In those findings the trial judge certified that at the conclusion of the hearing, in the jury's absence, he found the confession offered in evidence as being voluntary and admissible. The evidence is undisputed that before Petitioner made the confession introduced into evidence, he had been taken before a magistrate, at which time charges were preferred against him and bail set. Further, Petitioner, while in custody, had been visited by relatives and friends and had consulted with an attorney. None of the officers who Petitioner claimed

had threatened and physically abused him when he made the first two confessions were present when he made the confession to Deputy Sheriff Howell.

The protective umbrella of *Escobedo v. Illinois*, 378 U.S. 478 (1964), has now been lifted by this Honorable Court in *Johnson v. New Jersey*, 384 U.S. ——, 86 S.Ct. 1772, by which decision it was determined that *Escobedo* was not to be applied retroactively, that is, to trials which commenced prior to June 22, 1964. Petitioner's trial was commenced on May 11, 1964, some six weeks prior to the decision of this Court in *Escobedo*. Likewise, the rule laid down by this Court in its decision in *Miranda v. Arizona*, 384 U.S. ——, 86 S.Ct. 1602, was applied prospectively in *Johnson v. New Jersey*, supra.

Thus, the only serious question presented here is whether the confession offered in evidence was illegally obtained and was the fruit-of-the-poisoned tree.

Of course, if the confession obtained is not the result or "fruit" of the illegal arrest or coercion or threats or abuses, or other "poisonous tree," such "fruit" thereof is not tainted and therefore is admissible. *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *United States v. Bayer*, 331 U.S. 532 (1947).

Furthermore, there are cases following the reasoning of *Lyon v. Oklahoma*, supra, which would indicate that even an involuntary confession will not necessarily prevent an after-acquired confession from being voluntary. It is clear in those cases and in the *Miranda* rule as qualified by *Westover v. United States*, 86 S.Ct. 1602 (1966), that if the surroundings are different and a more explicit warning is given with a more ex-

acting determination of the Petitioner's understanding thereof, the confession is admissible.

Deputy Sheriff Howell testified at Page 230 of the Record:

"Q. I ask you further, sir, if before Mr. Clewis gave you State's Exhibit 13 whether or not you first warned him that he did not have to make any statement at all.

"A. I did.

"Q. And that any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement is made.

"A. I did to that exact effect, yes, sir."

We find on Page 235 of the Record that:

"Q. Was a Texas Ranger present when he gave you State's Exhibit 13?

"A. No, sir.

"Q. Was there a detective from the police department present when he gave you State's Exhibit 13?

"A. There was not.

"Q. Was there a lie detector man present when he gave you State's Exhibit 13?

"A. There was not.

"Q. When the defendant told you that he had been abused, what did you say to him before you took this, then?

"A. I told him that regardless of what might have happened in the past and regardless of what he might want to say or do now, that no harm and no abuse of any form would come to him at all.

"Q. All right, sir. Did he make a request to you concerning a telephone call —

"A. Yes, sir.

"Q. —to see someone?

"A. Yes, sir, he said he would like to talk to someone.

"Q. What happened then?

"A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.

"Q. All right, what happened?

"A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time.

"Q. Did you see any signs of abuse at all concerning the defendant when you were talking to him about State's Exhibit 13?

"A. Absolutely none.

"Q. Approximately how long did Mr. Mims talk to the defendant on this occasion?

"A. Oh, three to five minutes.

"Q. Then did Mr. Mims stay or did he leave?

"A. He left.

"Q. And whom did that leave then in your office there? Who was present then?

"A. Chief deputy Guy Fletcher and I, along with the defendant.

"Q. I beg your pardon?

"A. Along with the defendant.

"Q. Yes. Do you recall whether or not defendant had any coffee that morning?

"A. Yes, sir, he did have.

"Q. In your office there?

"A. Yes, sir.

"Q. Tell the jury whether or not you mistreated this defendant in any way.

"A. In no way whatever.

"Mr. Smith: We pass the witness."

And at page (R. 237):

"Q. Mr. Howell, concerning his stay in the county jail, tell the jury whether or not he was treated like any other prisoner while he was in the county jail.

"A. Absolutely.

"Q. Were you on duty on that weekend, Saturday and Sunday, before this Tuesday the confession was given, the statement was given?

"A. Yes, sir, that was my duty weekend.

"Q. Would you tell the jury whether or not, please, church people came to the jail on Sunday?

"A. Yes, sir, they did.

"Q. Did they hold services?

"A. Yes, sir.

"Q. Would you tell us, please, whether or not Marvin Clewis participated in the services in a group capacity.

"A. In a group capacity, yes, sir.

"Mr. Smith: We have no further questions."

In *Westover v. United States,* supra, at Page 1639, this Court stated:

> "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warning. *A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.*" (Emphasis Ours)

The salient features—incommunicado interrogation of an individual in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights that were present in *Escobedo,* supra; *Miranda,* supra; *Fikes v. Alabama,* 352 U.S. 191, 77 S.Ct. 281; *Culombe v. Connecticut,* 367 U.S. 568, 81 S.Ct. 1860; *Reck v. Pate,* 367 U.S. 433, 81 S.Ct. 1541, and *Davis v. North Carolina,* 86 S.Ct. 1761, *are not present in the instant case.* Here there was no incommunicado detention, Petitioner had been taken before a magistrate, he had consulted with an attorney, and had been warned that he need not give any statement whatsoever and that any statement that he would give would be used in evidence against him. The Petitioner has never suggested any impropriety in the interrogation by the Sheriff's Department which would require the exclusion of this statement.

In Goldsmith v. United States, 277 F.2d 335 (D.C. 1960), Appellant argued that he had been beaten and

terrified during interrogation, and that he re-affirmed the written statement after arraignment in fear of subsequent brutality. The Court held that even though oral and written confessions of defendants made before preliminary hearing may have been inadmissible for violation of the rule requiring preliminary hearing without unnecessary delay, under the circumstances the defendant's re-affirmation and enlargement of the formal written confession after preliminary hearing, including re-enactment of the crime, were not inadmissible as being the fruit of the original confessions. See also *United States v. Gorman,* 355 F.2d 151, cert.den. 86 S.Ct. 1962.

This Court, in *United States v. Bayer,* supra, said:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

The Court in *United States v. Hickey,* 247 F.Supp. 621 (1965), held at Page 624:

> "It is true that where a confession is secured by actual physical or psychological coercion, the intimidation or fear caused by this coercion may continue to lurk in the defendant's mind and destroy the validity of a later confession. Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954); Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct.

1208, 88 L.Ed. 1481 (1944). In such cases, the later confession may well become the "fruit of the poisonous tree." See Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920). However, the Courts have refused to extend this doctrine to cases wherein the defendant has confessed twice, once before and once after he has been advised of his rights. United States v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947); Goldsmith v. United States, 107 U.S.App. D.C. 305, 277 F.2d 335 (1960), cert. denied, 364 U.S. 863, 81 S.Ct. 106, 5 L.Ed.2d 86 (1960); Castle v. United States, 287 F.2d 657, 662 (5 Cir. 1961), reversed on other grounds, 368 U.S. 13, 82 S.Ct. 123, 7 L.Ed.2d 75 (1961). A confession is not rendered inadmissible solely because an earlier one was made without the defendant first being advised of his rights. The failure to inform him of his right to counsel is not irremediable; and once forewarned and cognizant of his rights, he has only his conscience with which he must contend."

Respondent is not familiar with any case in which this Court has ever held that an invalid confession ipso facto invalidates all subsequent confessions as a matter of law. It does not seem to us to be a denial of due process for the State to allow the jury to say, under all the facts and circumstances in evidence and under proper instruction by the court, whether the subsequent confessions were tainted or were free and voluntary. This is precisely what our Courts have done in the State of Texas. In *Lyons v. State of Oklahoma*, supra, it was said:

"The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of a sub-

sequent confession under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary."

We cannot say here that the subsequent confession as a matter of law was so completely under the influence of the first confession that to let a jury pass upon that influence as it affected the voluntariness of the later confession amounts to a denial of due process of law. To let the jury pass upon this question is not so unfair to Petitioner as to violate the fundamental principles of justice.

This Court, in *Wong Sun v. United States,* 83 S.Ct. 407 (1963), 371 U.S. 471, at Page 419, stated:

> "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341."

II.

Petitioner next asserts that his constitutional rights were violated in that he did not have an arraignment or preliminary hearing. There is no constitutional requirement that the states promptly present their prisoners for arraignment or preliminary hearing before a magistrate. In order to constitute a federal constitutional basis for vitiating a state conviction, it must be shown that a delay in taking an accused before a magistrate or the failure to conform to the state's requirements as to preliminary hearing or arraignment proceedings denied the accused due process of law in that it was in some way detrimental to his defense or

contributed to his conviction. *Gallegos v. Nebraska,* 342 U.S. 55, 65, 71 (1951); *Stein v. New York,* 346 U.S. 156, 187 (1953); *Lisenba v. California,* 314 U.S. 219, 235 (1941). Petitioner has produced no evidence in this case which would indicate that the State's alleged failure in any way resulted in prejudice to him at his trial. The mere technical infraction of a state procedural requirement would not of itself suffice to work a denial of due process.

The exclusionary principle applicable to criminal prosecutions in federal courts where the accused was not brought without unnecessary delay before a judicial officer, established by *McNabb v. United States,* 318 U.S. 332 (1943), has not been extended to state prosecutions as a requirement of the Fourteenth Amendment. *Culombe v. Connecticut,* supra.

III.

Petitioner complains of the trial court's overruling his pre-trial motion for discovery of certain documents and statements alleged to be in possession of the District Attorney. *Jencks v. United States,* 353 U. S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103.

By way of introduction, Respondent would point out that the Texas Court of Criminal Appeals in *Gaskin v. State,* 353 S.W.2d 467, has applied substantially the same rule to Texas prosecutions as has been applied to Federal by the so-called *Jencks* Act (18 U.S.C.A., § 3500). This rule applies where demand is made after the witness has testified on direct examination and under such rule the defendant is entitled to inspection of the statement for the purpose of cross-examination or impeachment, whether the statement has been used

by the witness before trial to refresh his memory or not.

We are cited no authority by Petitioner to support his premise that the Constitution requires the granting of his pre-trial motion for discovery. At the proper time when such officer had commenced his testimony on the voluntariness of the confession or confessions, Petitioner's counsel stated (R. 90):-

> "MR. LEGG: I am not asking for the confessions. I have told you that I don't even care to see them; I want to tell you that these confessions are inadmissible. The Court has got a right to look at them at any time he wants to and can in connection with this motion."

Accordingly, where Petitioner clearly indicated at the trial that he did not wish to see or use the prior confessions, it is difficult to see how he can complain here that they were not furnished to him in accordance with his pre-trial motion for discovery.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted,

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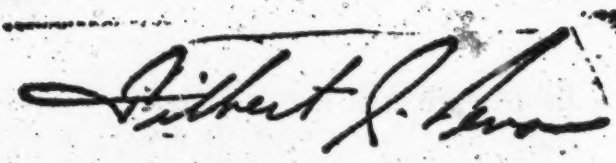

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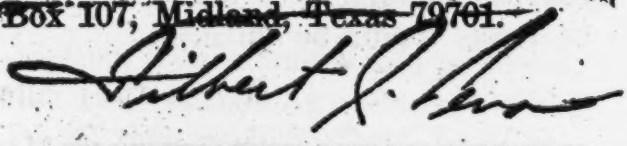
PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Reagan H. Legg, 1000 Midland Savings Building, P. O. Box 107, Midland, Texas 79701.



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